



**Mutheo v Chairman Board of Management Machakos Teachers College & 3 others  
(Civil Appeal 17 of 2020) [2024] KEHC 8413 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8413 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 17 OF 2020**

**FROO OLEL, J  
JULY 11, 2024**

**BETWEEN**

**JONATHAN MULWA MUTHEO ..... APPELLANT**

**AND**

**THE CHAIRMAN BOARD OF MANAGEMENT MACHAKOS TEACHERS  
COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**THE SECRETARY BOARD OF MANAGEMENT MACHAKOS TEACHER'S  
COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MACHAKOS TEACHERS COLLEGE ..... 3<sup>RD</sup> RESPONDENT**

**MACHAKOS TEACHER'S COLLEGE ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The Appellant was the Plaintiff in the primary suit, where he had sued the respondents alleging that the 2<sup>nd</sup> respondent by the letter dated 10<sup>th</sup> December 2016, referenced MATECO/007/09, signed by Dr. Lucy Mugambi, and copied to the Board of management of the 4<sup>th</sup> respondent institution falsely and maliciously published of and concerning him over his suspension from duty as follows.

“Following several incidences in the colleague that poses security risk including threatening the life of members of staff while you were on duty, you are hereby suspended from duty with effected from 10<sup>th</sup> December 2016 until further notice. You are required to hand over all your work tools to the head of security Mr. Thomas Matingu at 8.00am on 11<sup>th</sup> December 2016 and clear from the college premises. Take note that you are supposed to keep off from the college premises during the period of suspension”



2. The appellant averred that the said words in their ordinary and plain meaning and by necessary implication, meant and could only be interpreted by ordinary just and right thinking members of the society to mean that he was a threat, murderer, evil person, killer, and had satanic capabilities of harming others who worked at the institution consisting of over 2000 people, and which letter/publication had been brought to the attention of all and sundry who worked at the 4<sup>th</sup> respondent institution. This had caused him to be shunned and exposed him to public odium, contempt and ridicule.
3. The appellant further averred that the said letter published towards him was not only actuated by malice, contempt and spite but was also calculated to injure, discredit, intimidate and expose him to hatred, contempt and ridicule. Despite demand, the respondents had refused to retract the said publication and/or publish an apology over their illegal action. He therefore prayed that judgment be entered in his favour.
4. The Respondents herein, denied all the averments as made by the appellant and further averred that that the appellant had wrongly interpreted the suspension letter and that he was never sacked but only procedurally suspended from duty. They put the Appellant to strict proof to all his allegations.

## **B. Facts of the Case**

5. At trial, the Appellant testified and called two (2) witnesses in support of his case. The Appellant adopted his witness statement and also produced his documents as Exhibits. The witness statement rehashed the facts as pleaded in the plaint and emphasized that on 10<sup>th</sup> December 2016, the 3<sup>rd</sup> respondent had called him and his colleagues into her office and told them that they had threatened to kill staff members. These allegations were false, defamatory in nature and was meant to tarnish their good reputation, which they had upheld for the 10 years they had worked at the 4<sup>th</sup> respondent institution without any prior suspension or being indicated for any offence.
6. Later he learnt that the letter, which had been used to sack them, had been circulated within the 4<sup>th</sup> respondent institution, and was placed on three notice boards within the said institution. As a result, members of the 4<sup>th</sup> respondent institution had shunned him and he prayed for compensation for damages suffered. Upon cross examination the Appellant confirmed that he did not photocopy the letter alleged to have been posted on the notice board and he had been given a copy of his letter (which was in an envelope) by the principal. His letter was a suspension letter and was not published in any media outlet. For what had transpired, he had expected the respondents to have publish an Apology on its notice board.
7. PW2 Richard Mutua Kimenzu, also adopted his witness statement dated 30.05.2019, where he confirmed that he knew the Appellant and they were workmates at the 4<sup>th</sup> respondent institution. He was a good person of good morals. They were suspended from work in December 2016, and he later saw a letter on the college's notice board concerning the Appellant, which letter stated that the appellant had threatened to take away people's life. The said letter had been written by the 3<sup>rd</sup> respondent and was copied to the 4<sup>th</sup> respondent. On the notice board, over 2000 students had access to the said letter, whose content was defamatory towards the Appellant and as a result he was shunned.
8. Upon cross examination PW2 confirmed that he had been employed by 4<sup>th</sup> respondent in 2007 and did not know when the appellant was employed as he had found him working there. There were several notice boards in the college and the Appellants letter was headed suspension from duty. PW3 John Bosco Mutisya also adopted his witness statement as his evidence in chief. He had been employed by the 4<sup>th</sup> respondent institution in 2012 and left employment in 2016. He worked at the farm department



while the appellant was in security department. After the Appellant had been dismissed, he saw the defamatory letter on the college notice board and it was posted when college was in session. The letter alleged that the Appellant was threatening college staff members and as a result he had been shunned by the college community.

9. DW1 Lucy Musumbi testified and confirmed that she was the principal of Machakos Teacher's College and secretary Board of Management. The institution had clear communication channels depending on which issue they were addressing. For matters concerning their staff, they would deliver the letter directly to the addressee, but for general communication memos are fixed on notice boards. The Appellants letter was delivered to him directly through an internal delivery book, which the Appellant signed. The said letter was not pinned on the notice board as alleged and nor did they defame the Appellant. He was therefore not entitled to any damages. Further as the secretary to the board, she had the duty to copy the letter to the chair of the board for her duty as secretary of the board was to work on their behalf.
10. On cross examination and re-examination, DW1 confirmed that the letters to staff are normally delivered by the secretary to the principal, who was the custodian of the delivery book. But for external communication, the 4<sup>th</sup> respondent's messenger would deliver the same.
11. The Trial Court considered the evidence tendered, the submissions filed and, in its judgment, delivered on 29<sup>th</sup> January 2020 did find that the Appellant had failed to mount sufficient evidence to prove his claim on a balance of probabilities and proceeded to dismissed the suit with cost to the respondents.
12. The Appellant being dissatisfied by this judgment filed his memorandum of Appeal on 18<sup>th</sup> February 2020 and raised grounds of appeal namely: -
  - a. That the Learned Trial Magistrate erred and misdirected himself in law and in fact when he refused to consider the pleadings as filed by the plaintiff.
  - b. That the Learned Trial Magistrate erred and misdirected himself in law and in fact when he refused to consider the plaintiff's submissions as to the whole case.
  - c. That the Learned Trial Magistrate erred and misdirected himself in law and in fact when he refused to be guided by the laid down law on defamation and ingredients involved in defamation.
  - d. The Learned Magistrate erred and misdirected himself in law and fact when he sided with the defendants yet the defendants had nothing to offer in defence.
  - e. The Learned Magistrate erred and misdirected himself in law and fact when he failed to note that a party is bound by its pleadings and also evidence tendered in court.
  - f. The Learned Magistrate erred and misdirected himself in law and fact when he failed to wholly consider and analyze the plaintiff's witnesses' evidence as given in court together with filed statements.

### **C. The parties Submissions**

13. The Appellant filed submissions on 30. 03.2023 and relied on the case of David Sironga Ole Tukai vs Francis Arap Muge & 2 others (2014) eKLR to buttress the point that the court is duty bound to adjudicate upon specific matters raised by the parties in their pleadings. The court had misinterpreted the import of the defamatory letter under consideration, which letter had clearly stated that the Appellant was threatening the lives of other members of staff and in essence painted him negatively as a threat to the community, a killer, and a dangerous person capable of harming others. This averment



was never disputed by both set of witnesses and the court fell into error by failing to find that this evidence was not rebutted.

14. The respondent, further submitted that the trial magistrate misdirected himself by not considering the evidence tabled by the appellant and associating with evidence of the respondent. The appellant averred that the his evidence was that an advanced copy of the letter given to him was posted on the notice board of the 4<sup>th</sup> respondent institution, where the whole community of the 4<sup>th</sup> respondent has access and upon reading its content, began to shun and avoid him, believing that he was a man capable of killing his colleagues and was a potential murderer.
15. It was submitted that the statement published regarding the Appellant was false, malicious and undoubtedly disparaged his character amongst his peers and workmates. By publishing this letter on the notice board the 4<sup>th</sup> respondent, had a clear intention to injure his reputation and therefore were totally liable for the libel and slander suffered. Reliance was placed on the case of Wycliffe A. Swanya v Toyota East Africa Ltd & another Civil Appeal & 0 of 2008 & Halsbury Law of England 4<sup>th</sup> Edition Volume 28 on the definition of defamation.
16. The Appellant made further reference to Gately on Libel and Slander 6<sup>th</sup> Edition, where it was proffered that the respondent must prove the words complain about to be true and that the defence of fair comment of facts does not extend to cover misstatements of facts. The trial magistrate had failed to note that the respondents were not disputing using the defamatory words as alleged in the letter of suspension and therefore should have been found to be liable for defaming the Appellant. Reliance was made to the case of JP Machira vs Wangechi Mwangi & another HCCC No 1709 of 1996 and Phinehas Nyagah v Gitobu Imanyara Civil suit No 697 of 2009. Where it was held that where malice was imputed and proved damages would be awarded.
17. The Appellant urged the court to find that this Appeal had merit and proceed to allow the same as prayed for in the Memorandum of Appeal.
18. The respondent's despite being served did not take part in these proceedings and did not file any submissions.

#### **D. Analysis & Determination**

19. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses who testify and make allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



20. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubhe v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

21. This court has considered the ground of Appeal, the lower court record and the submissions of the appellant and finds that the grounds of Appeal can be synthesized to the determination as to;

- i. Whether the Respondent’s publications concerning the Appellant was defamatory of the Appellant?
- ii. Whether the said publications were true in fact and substance or whether the same were false, malicious, negligently and/or recklessly published.
- iii. Whether the Respondent was justified to make the said publications in its form, manner and style?
- iv. Whether the said publication disparaged and discredited the Appellant’s reputation and injured his character and exposed him to hatred, ridicule, scandal, odium or contempt?

22. Adopting the issues framed above, I now proceed to determine them in line with the fundamentals principles of determining defamation. Before I do that, it is important to note that the burden of proof lies with the Appellant to prove his case on a balance of probabilities. As stipulated in Section 107 of the *Evidence Act*, the burden of proving that the alleged letter was published and was defamatory lay on the Appellant. Further as stipulated under Section 109 of the *Evidence Act*, the burden of proof lies with that person who wishes the court to believe in its existence and that he who asserts a fact must prove.

23. However, where the respondent pleads the defences of justification, truth and fair comment in the public interest, then the burden of proof lies on him/them to prove, on a balance of probabilities, that the matters complained of by the Appellant are true, justified and fair comment made in public interest.

24. On the first issue as framed, of whether the respondent’s publications concerning the Appellant was defamatory, In *Miguna Miguna v Standard Group Limited & 4 others* [2017] eKLR, the Court of appeal stated as follows regarding defamation, and I have no reason to differ:

“Speaking generally a defamatory statement can either be libel or slander. Words will be considered defamatory because they tend to bring the person named into hatred, contempt or ridicule or the words may tend to lower the person named in the estimation of right-thinking members of society generally. The standard of opinion is that of right-thinking persons generally. The words must be shown to have been construed or capable of being construed by the audience hearing them as defamatory and not simply abusive. The burden of proving the defamatory nature of the words is upon the plaintiff. He must demonstrate that a reasonable man would not have understood the words otherwise than being defamatory. See *Gatley on Libel and Slander* (8th edition para. 31).

25. The ingredients of defamation were also summarized in the case of *John Ward V Standard Ltd, HCCC 1062 of 2005* as follows:-

“.....The ingredients of defamation are:



The statement must be defamatory.

The statement must refer to the plaintiff.

The statement must be published by the defendant.

The statement must be false."

26. In Halsbury's Laws of England (Supra), a defamatory statement is defined as :

"...a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business."

27. In Phinehas Nyaga vs Gitobu Imanyara [2013] eKLR it was held that defamation was not about publication of falsehoods against a plaintiff but rather, the plaintiff must show that the published falsehood disparaged his reputation and lowered him in the estimation of right-thinking members of the society generally.

28. In SMW vs ZVM [2015] eKLR , the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

29. In the case of Newstead vs London Express Newspaper Ltd [1940] 1 KB 377 [1939] 4 ALL ER 319, it was held as follows:-

"Where the plaintiff is referred to by name or otherwise clearly identified, the words are actionable even if they were intended to refer to some other persons. It is not essential that the plaintiff must be named in the defamatory statement; where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him."

30. Thus, to prove defamation, the claimant must establish or demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously. The words complained off must be shown to have injured the reputation, character or dignity of the Appellant, must tend to lower his reputation in the estimation of right-minded persons in the society or they must tend to cause the Appellant to be shunned or avoided by other persons.

31. Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the Respondent knew the words complained of were false or did not care to verify can be evidence of malice. In Ann Wairimu Njogu vs Radio Africa Limited [2017] eKLR, it was held that malice also had to be inferred from the alleged defamatory statement.

32. The appellant averred that his letter of suspension from duty dated 10<sup>th</sup> December 2016 and copied to the board of management of the 4<sup>th</sup> respondent, which letter falsely and maliciously painted him as



a person who had threatened the lives of other staff members and that he was a threat, murder or evil person out to harm them. The specific words uttered in the said letter were that;

“Following several incidences in the college that pose a security risk including threatening the life of members of staff while you were on duty, you are hereby suspended from duty with effect from 10<sup>th</sup> December 2016 till further notice.....”

33. The appellant further alleged that this letter was published on the notice board of the 4<sup>th</sup> respondent’s institution. His contention was supported by PW2 and PW3, who backed up this claim. The 3<sup>rd</sup> respondent, on the other hand denied that there was anything defamatory in the said letter as it was a matter handled in the normal cause of business of the institution and was not published to the institution community, but personally handed over to the Appellant, who received and signed in acknowledgment of the same and further the said letter was only copied to the board chair of the 4<sup>th</sup> respondent as a matter of official communication to those running the institution.
34. To guide the interrogation of whether the learned Judge erred in his interpretation of defamatory letter, this Court’s finding in *Sun Sand Dunes Limited v Raiya Construction Limited* [2018] eKLR is instructive:

“The object of construction of terms of a contract/ words in a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean.”

35. Having considered the reasoning of the trial Magistrate, I do find that he made an error in his interpretation of the allegations made in the said letter. The letter complained of clearly stated that “Following several incidences in the college that pose a security risk including threatening the life of members of staff while you were on duty”. This clearly implied that the Appellant threatened the life of members of staff, and that led to his suspension from duty. It was therefore proved that the letter was published by the 3<sup>rd</sup> respondent (who admitted to its publication) and the contents thereof referred to the Appellant.
36. The second issue which the appellant had to prove was that, the said letter was published to the public. It was his evidence that indeed the said letter was published and posted on the institutions notice board where all and sundry had access to and read its content. His position was supported by his witnesses. The trial Magistrate on consideration of this issue rightly observed that the Appellant did make this allegation/allegation in his plaint and/or witness statement filed in court and during cross examination confirmed that indeed he was served by the said letter personally by DW1 and signed the delivery book in acknowledgement thereof.
37. This clearly shows that the issue of its publication on the notice board came as an afterthought and had to be taken with a pinch of salt. The Appellant never amended his plaint and/or filed a supplementary witness statement to bring out the issue of publication. The witness statement of the Appellants two witnesses were filed two year after the suit had been filed hence lending credence the magistrates assertion that this issue was raised to patch up the Appellants weak case.
38. Finally, to settle this issue of publication, even if the appellant were to be believed that the defamatory letter was placed on the notice board, the evidence presented to support that contention is contradictory. The appellant in his evidence in chief alleged that “I was dismissed for allegedly threatening to kill people. The letter was placed on 3 notice boards at the college”.PW2 stated that “He was



- dismissed in 2016. I saw a notice about the dismissal.” PW3 on the other hand stated that “Plaintiff has since been dismissed. I saw the letter on the college notice board. The letter was posted while college was in session.”
39. The direct import of this evidence is that the Appellant’s dismissal letter was posted on the notice board. The letter dated 10<sup>th</sup> December 2016, was not a dismissal letter but a suspension from duty letter. No dismissal letter of the Appellant was produced into evidence during the proceedings to enable the court interrogate the same. I do find therefore on a balance of probability, that the evidence of publication was not proved.
40. Finally, the respondents defence during the proceedings was that, the communication issued was privileged and was a fair comment on a matter touching normal intuitional management dynamics. It is a defence to a tort of defamation where the defendant/respondent claims that the statement was made in a context generally deserving of protection for policy reasons. There are two types of privilege which can be asserted in defence of a defamation tort. Absolute privilege which protects the statement from a defamation claim. Absolute privilege cases covers like testimony in court, by a witness, statement by lawyers and judges in proceedings.
41. Qualified privilege on the other hand may apply where the matter is of public interest or concern. The defence of qualified privilege is available when the defendant shows.
- a. The statement is made in the discharge of a public duty.
  - b. Statement made on a subject matter in which the defendant has legitimate interest.
  - c. Statement made by a defendant to obtain redress for a grievance.
  - d. Reports of parliamentary proceedings.
  - e. Extracts from or abstracts of Parliamentary reports, papers, votes or proceedings published by the authority of Parliament. [See Gatley on Libel and Slander 8<sup>th</sup> Edition page 441].
42. In Hulsbury’s Law of England 4<sup>th</sup> Edition Vol. 28 at Paragraph 109 the rationale for the defence of qualified privilege is explained as follows;
- “On grounds of Public policy, the law affords Protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person even when that statement is in-fact untrue and defamatory. Such occasions are called occasions of qualified privilege. The principal categories of qualified privilege are;
1. Limited communication between persons having a common and corresponding duty or interest to make and receive the communication.
  2. Communication to the public at large or to a Section of the Public made pursuant to a legal, social or moral duty to do so in reply to a public attack.
  3. Fair and accurate reports published generally or proceedings of specified persons or bodies.
43. For the defence of qualified privilege to be available the Respondent, it must be shown that the statement was made (a) in good faith and (b) without any improper motive. Where the plaintiff establishes that the defendant acted in bad faith and was driven by improper motives then the defence of qualified privilege would have been demolished.



44. The evidence presented and indeed confirmed by the Appellant was that he was employed as a security officer at the 4<sup>th</sup> respondent institution and in the course of his work received a suspension letter, which was in an envelope and which letter he signed acknowledging receipt of the same. The letter was rightly copied to the 1<sup>st</sup> respondent, the institution's board chair, and as such it is confirmed that this was communication limited between persons having a common and corresponding duty or interest to make and receive the communication. No malice therefore could be imputed on their part and no malice or improper motive as pleaded was proved.

### **Disposition**

45. The upshot and having found as above, I do find that this appeal lacks merit and proceed to dismiss the same.

46. Each party will bear their own costs.

47. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 11<sup>th</sup> day of July, 2024.**

In the presence of;

M. Makau for Appellant

No appearance for Respondent

Sam Court Assistant

